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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JOHN A. PRATT and MARY H. PRATT, Debtor.	BAP No. WO-99-056
JOHN A. PRATT and MARY H. PRATT, Plaintiffs – Appellees, v. TOWER DAY SURGERY CENTER; THE THERAPY CENTER; and ORTHOPAEDIC and RECONSTRUCTIVE CENTER, Defendants – Appellants.	Bankr. No. 97-21636 Adv. No. 98-1030 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before CLARK, PEARSON, and ROBINSON, Bankruptcy Judges.

PEARSON, Bankruptcy Judge.

Tower Day Surgery Center, The Therapy Center, and Orthopaedic and Reconstructive Center, P.C. (collectively, the Creditors), appeal a judgment of the bankruptcy court avoiding the Creditors' respective statutory liens in whole or in part. For the reasons set forth below, we AFFIRM.

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

I. Background.

Mary Pratt (the Debtor) was injured in an automobile accident in November 1995. Orthopaedic and Reconstructive Center, P.C. (ORC), is a group of medical doctors engaged in surgery and treatment of patients. Tower Day Surgery Center (TDS) is a single-day surgery facility. The Therapy Center (RAI) is engaged in rehabilitation and physical therapy services. All three Creditors are Oklahoma corporations solely owned by Houshang Seradge, M.D., a licensed physician under Oklahoma law. The Creditors rendered health care services to the Debtor after her accident.

In April 1996, the Creditors each filed a physician's lien statement pursuant to Okla. Stat. tit. 42, § 46, for the amounts then due for services. The statements each included the following language: "up to the final balance."[1] The lien statements were served by certified mail on the Debtor, her attorney, and Farmers Insurance Company, the company that insured the person who caused the accident (Farmers).[2] After the lien statements were filed and served, the Creditors continued to treat the Debtor.

In April 1997, the Debtor received and cashed a check for $20,000.00 from her own insurer. In June 1997, the Debtor received two checks from Farmers in the amounts of $20,000.00 and $10,000.00.[3] At oral argument, counsel informed the Court that the $10,000.00 check had been cashed by the Debtor and the $20,000.00 check, made payable jointly to the Debtor and the Creditors, was being held pending the

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[1] ORC's lien statement was in the amount of $3,596.60; TDS's in the amount of $6,007.60; and RAI's in the amount of $1,800.80.

[2] In their cross-motion for summary judgment, the Debtors contended that the Creditors' lien statements were not properly perfected because they were mailed to Farmers, rather than the tortfeasor. The trial court rejected the Debtors' argument, holding that the requirement in Okla. Stat. tit. 42, § 46, that the lien claimant send a copy of the notice to "the person, firm, or corporation against whom the claim is made," includes Farmers. The Debtors did not appeal.

[3] It does not appear the Creditors are making a claim against the proceeds from the Debtor's own insurer.

outcome of this appeal. In September 1997, the Creditors each filed and served "amended" lien statements for increased amounts and added "up to final balance."[4]

The Debtor and her spouse (collectively, the Debtors) filed a Chapter 7 petition on November 17, 1997, after receiving the payments from Farmers and their own insurer. They then filed a "Complaint to Determine the Validity of Lien," naming the Creditors as defendants. The complaint asserted that each of the Creditors' claimed physician's liens "impairs and clouds Plaintiff's claim to otherwise exempt property" and asked that the bankruptcy court "enter a judgment determining Defendants' liens improperly perfected, null, void and without effect."

The parties filed cross motions for summary judgment. The Debtors maintained that TDS and RAI were not "physicians" entitled to file a lien statement under the Oklahoma statute because they were not persons licensed to practice medicine. The Debtors stipulated that ORC qualified as a "physician" and was entitled to claim a lien, but argued that the amount of that lien was limited to the amount set out in the original lien statement. (Appellants' Appendix M, p. 2).

The trial court granted the Debtors' motion in part, avoiding the liens of TDS and RAI in their entirety and holding that ORC was entitled to a lien in the amount originally filed. The trial court held that the liens of TDS and RAI were avoidable because they were not licensed as "physicians" under the Oklahoma statute. It concluded that the second lien statement filed by ORC after the Debtor received the settlement proceeds did not attach, and thus was not enforceable against the proceeds.

The Creditors appealed.

II. Appellate Jurisdiction.

This Court, with the consent of the parties, has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the

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[4] ORC's second lien statement was in the amount of $9,341.40; TDS's in the amount of $8,543.10; and RAI's in the amount of $15,849.95.

Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1). Under this standard, we have jurisdiction over this appeal. The parties have consented to this Court's jurisdiction in that they have not opted to have the appeal heard by the United States District Court for the Western District of Oklahoma. *Id*. § 158(c); 10th Cir. BAP L.R. 8001-1(a) and (d). The appeal was filed timely by the Debtor, and the bankruptcy court's Order is "final" within the meaning of
§ 158(a)(1). *See* Fed. R. Bankr. P. 8001-8002.

III. Standard of Review.

The grant or denial of summary judgment is reviewed de novo, applying the same legal standard used by the lower court pursuant to Fed. R. Civ. P. 56(c). *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996).

IV. Discussion.

Summary judgment is governed by Fed. R. Civ. P. 56, which is incorporated into bankruptcy practice by Fed. R. Bankr. P. 7056. Summary judgment is appropriate where there are no genuine issues of material fact before the court such that the moving party is entitled to judgment as a matter of law. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). If there is no genuine issue of material fact in dispute, then the appellate court determines if the substantive law was correctly applied by the district court. *Kaul v. Stephan*, 83 F.3d at 1212. Pursuant to Rule 56, in reviewing a grant of summary judgment, legal issues in the case are reviewed de novo, applying the same legal standards used by the bankruptcy court. *Hollytex Carpet Mills, Inc. v. Oklahoma Employment Sec. Comm'n (In re Hollytex Carpet Mills, Inc.)*, 73 F.3d 1516, 1518 (10th Cir. 1996). De novo review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991). The appellate court is not constrained by the trial court's conclusions, but may affirm the district court on any legal ground supported by the record, whether it was argued below

or not. *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1524 (10th Cir. 1997); *Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995). In this case, the parties agreed that there were no genuine issues of material fact in dispute and the issues presented are questions of law.

Although the Debtors' underlying "Complaint to Determine Validity of Liens" fails to assert a specific Bankruptcy Code provision under which they were seeking to avoid the Creditors' liens and the trial court did not specify the provision in its Opinion, the trial court could only have avoided the Creditors' liens pursuant to 11 U.S.C. § 522(h),[5] which gives a debtor limited power to avoid certain liens under § 545.[6] Accordingly, we will assume that the trial court avoided the Creditors' liens under §§ 522(h) and 545(2). *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) ("'[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law'. . . ." (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)). Making this assumption, we cannot find, nor have the Creditors argued, that the trial court erred in applying these sections.

Under § 522(h), which incorporates by reference § 522(g)(1), the Debtors may avoid a transfer if: 1) the transfer was an involuntary transfer of property by the

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[5] Future references are to Title 11 of the United States Code unless otherwise noted.

[6] Although the Debtors' Complaint states that the Creditors' liens "impair" their claimed exemption, thereby implicating § 522(f), that section is not applicable as it only applies to judicial, not statutory, liens. Furthermore, the Debtors requested that the trial court find that the liens were "null and void," thus implicating §§ 502(b)(1) and 506(d). But we decline to find that the trial court ruled under those sections because in its Judgment the court stated that the liens in question were "avoided" in whole or in part, therefore indicating that it was not applying those sections. In addition, there is a legal question as to whether §§ 502(b)(1) and 506(d) apply absent the filing of a proof of claim. Since we cannot discern from the appellate record whether the Creditors filed proofs of claim against the Debtors or not, we decline to decide the legal issue, or to rule on the application of §§ 502(b)(1) and 506(d).

Debtors; 2) the Debtors did not conceal the property; 3) the trustee did not attempt to avoid the transfer; 4) the Debtors exercise an avoidance power listed within § 522(h); and 5) the transferred property is of a kind that the Debtors would have been able to exempt from the estate if the trustee had recovered the property pursuant to one of the statutory provisions in § 522(g)(1). 11 U.S.C. § 522(g)(1) and (h)(1); *DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248, 1250 (9th Cir. 1995). Reviewing the avoidance sections listed in § 522(g)(1) and (h)(1)(A),[7] the only applicable avoidance provision is § 545(2), which states:

> The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien–
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> . . .
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> (2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such purchaser exists[.]

11 U.S.C. § 545(2). The Creditors have not argued on appeal that the trial court lacked the power to avoid their liens under §§ 522(h)(1) and 545(2), and, finding no reason not to apply these sections, we conclude that the trial court did not err in avoiding the liens, to the extent that they were invalid or unperfected under Oklahoma law. *See Milchem, Inc. v. Fredman (In re Nucorp Energy, Inc.)*, 902 F.2d 729 (9th Cir. 1990) (the enforceability of a statutory lien depends upon the state of its perfection at the time of the commencement of the bankruptcy case). Thus, we must consider the validity and perfection of the liens under Oklahoma law.

Oklahoma Statutes title 42, section 46, imposes a physician's lien on the proceeds of a claim by the patient against the tortfeasor, insurer, or other responsible party.[8] The Creditors argue that the trial court erred in ruling that TDS and RAI were

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[7] Section 522(g)(1) does not list § 545, but rather refers to the recovery of property under § 550. Section 550 applies to avoidance actions under § 545.

[8] Okla. Stat. tit. 42 §, 46, provides:

(continued...)

not licensed as "physicians" entitled to file a lien under section 46. The Creditors also argue that the trial court erred in limiting ORC's statutory lien to the amount itemized in the original lien statement filed and served before the settlement proceeds were received. We address each argument in turn.

A. Who is a physician.

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[8] (...continued)

A. Every *physician* who performs medical services for any person injured as a result of the negligence or act of another, shall, if the injured person asserts or maintains a claim against such other person for damages on account of such injuries, have a lien for the amount due for such medical services upon that part going or belonging to the injured person of any recovery or sum had or collected or to be collected by the injured person, . . . whether by judgment, settlement or compromise. . . .

B. In addition to the lien provided for in subsection A of this section, every *physician* who performs medical services for any person injured as a result of the negligence or act of another, shall have, if the injured person asserts or maintains a claim against an insurer, a lien for the amount due for such medical services upon any monies payable by the insurer to the injured person.

C. No lien which is provided for in this section shall be effective unless, before the payment of any monies to the injured person, his attorney, or legal representative as compensation for such injuries or death:

1. A written notice is sent setting forth an itemized statement of the amount claimed, identifying the insurance policy or policies against which the lien is asserted, if any, and containing the name and address of the physician claiming the lien, the injured person, and the person, firm, or corporation against whom the claim is made, is filed on the mechanic's and materialman's lien docket in the office of the county clerk of the county where the principal office of the physician is located; and

2. The physician sends, by registered or certified mail, postage prepaid, a copy of such notice with a statement of the date of filing thereof to the person, firm, or corporation against whom the claim is made and to the injured person. The physician shall also send a copy of the notice to the attorney for the injured person, if the name and address of such attorney is known to the physician.

Id. (emphasis added).

The statutory lien provision, section 46, does not define the term "physician." However, Okla. Stat. tit. 59, § 725.2(C),[9] which is contained in the statutory professional licensure provisions, specifically provides that, unless a particular statute states otherwise, the term "physician" includes only the six enumerated classes of persons listed in paragraphs 1 through 6 of subsection A of § 725.2. Subsection A refers only to persons "licensed" to practice medicine. Neither TDS nor RAI is licensed to practice medicine and the trial court correctly concluded that they are not entitled to the lien.

TDS and RAI argue that this reading of physician is too narrow, and that the legislative intent of section 46 would include any health care service provider. The legislative intent of the physician's lien statute was to encourage physicians to provide medical services to a person who has been injured by another and has insufficient funds to pay for the services when delivered. *Balfour v. Nelson*, 890 P.2d 916, 919 (Okla. 1994). The statute was also designed to ensure that physicians are paid once the patient is compensated for their injuries. *Id*. Oklahoma has similar liens for hospitals

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[9] Section 725.2 provides, in relevant part:

> A. The following seven classes of persons may use the word "Doctor", or an abbreviation thereof, and shall have the right to use, whether or not in conjunction with the word "Doctor", or any abbreviation thereof, the following designations:
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> 1. The letters "D.P.M." by a person licensed to practice podiatry . . . ;
> 2. The letters "D.C." by a person licensed to practice chiropractic . . . ;
> 3. The letters "D.D.S." by a person licensed to practice dentistry . . . ;
> 4. The letters "M.D." by a person licensed to practice medicine and surgery . . . ;
> 5. The letters "O.D." by a person licensed to practice optometry . . . ;
> 6. The letters "D.O." by a person licensed to practice osteopathy . . . ;
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> . . . .
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> C. Unless otherwise specifically provided in a particular section or chapter of the Oklahoma Statutes, the word "physician" or "physicians" shall mean and include each of the classes of persons listed in paragraphs 1 through 6 of subsection A of this section.

and ambulance service providers that provide services to persons injured by another and with insufficient funds to pay for the services when delivered. Okla. Stat. tit. 42 § 43 (hospital lien); Okla. Stat. tit. 42, § 49 (ambulance service provider lien).

The Oklahoma Supreme Court has held, however, that statutory liens stand in derogation of the common law, and thus must be strictly construed. "A lien that is not provided for by the clear language of the statute cannot be created by judicial fiat." *Riffe Petroleum Co. v. Great Nat'l Corp., Inc.*, 614 P.2d 576, 579 (Okla. 1980). "Neither may a lien be created out of a sense of fairness if the terms of the statutory lien are found too narrow and have not been met." *Id*.

Although TDS and RAI urge a broad definition of "physician", we find no authority for giving section 46 such an expanded scope. To expand the definition of "physician" to include all health care providers renders the hospital and ambulance service lien statutes superfluous. We therefore hold that the trial court did not err in narrowly construing the statutory lien provisions of Oklahoma law and concluding that the definition of "physician" in Okla. Stat. tit. 59, § 725.2, did not entitle TDS and RAI to a lien.[10]

B. Amount of lien.

Based on the parties' stipulation that ORC was a "physician" entitled to claim a lien, the trial court limited that lien to $3,596.60, the amount stated in the initial lien statement filed in April 1996, prior to receipt by the Debtor of the insurance settlement

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[10] TDS and RAI argue in the alternative that, if they are not entitled to a physician's lien, they should then be entitled to a hospital lien under Okla. Stat. tit. 42, § 43. As noted, Oklahoma strictly construes statutory liens. The Creditors' lien statements as filed state that they are "physician's liens filed in accordance with Okla. Stat. tit. 42 § 46" and make no reference to an alternative statutory basis for the lien asserted. Generally, a lien statement must state a legal basis and since the statements as filed make no reference to the alternative, they are clearly ineffective. Indeed, Creditors' argument actually supports the trial court's decision that the Creditors are not "physicians," since they more clearly fit into the alternative lien statute. *See generally Republic Bank & Trust Co. v. Bohmar Minerals, Inc.*, 661 P.2d 521 (Okla. 1983) (person who contracted to clear land and who used his own bulldozer to do so was not entitled to assert laborer's lien, although he may have been entitled to lien under materialman's lien statute).

checks in June of 1997. ORC filed a second lien statement, which it refers to as the "amended lien," on November 14, 1997, in the amount of $9,341.40 "and up to final balance." The trial court concluded that the second lien statement was untimely and that ORC's lien statement was perfected only in the specifically itemized amount on file at the time the settlement proceeds were disbursed. The Creditors argue that the second lien statement related back to the filing of the original lien statement and that the physician's lien should extend to ongoing medical services.

Subsection (C) of section 46 states, "No lien which is provided for in this section shall be effective unless, before the payment of any monies to the injured person, . . . a lien notice *setting forth an itemized statement of the amount claimed*" is filed and served. Okla. Stat. tit. 42, § 46 (emphasis added). It is undisputed that ORC's second filing was after the settlement proceeds were paid the Debtor. In order for a lien to be perfected under section 46, these actions must be accomplished prior to the payment of any monies to the injured person. Consequently, ORC's second lien statement was untimely and its lien was perfected only in the specifically itemized amount on file at the time settlement proceeds were disbursed.

The Creditors cite *Balfour v. Nelson*, 890 P.2d at 916. In *Balfour*, a physician who had rendered services filed physician's lien statements in 1989 and 1990, but did not seek to enforce them within the one-year limit for enforcement established by section 46.[11] In 1992, the physician, still unpaid, discovered that her patients were about to receive a settlement payment from the insurer and refiled her lien statements. The patients argued that because the physician had failed to commence an action to collect the amounts due to her within one year of the filing of the first physician's liens, she was barred from refiling the liens. The trial court agreed. On appeal, the Oklahoma

[11] The Court notes that the physician in *Balfour* filed second liens that were cumulative, incorporating amounts and services included in the first filings. Approximately two to four months elapsed between filings, as the services were ongoing.

Supreme Court reversed, holding that the physician was entitled to enforce the second lien statements. The court held that the physician could reestablish a lien against settlement proceeds by filing the same lien statement before the personal injury claim settled and before the statute of limitations ran on the underlying medical services contract. *Id*. at 920.

In *Malloy v. St. John Medical Center (In re Woodward)*, 234 B.R. 519 (Bankr. N.D. Okla. 1999), the court cited *Balfour* in concluding that the filing of a second lien statement does not relate back to the date of the initial filing. *Id*. at 528. In *Woodward*, the creditors' initial lien statements were invalid due to lack of documentation. Section 46 requires that, in order for a lien to be "effective," all of the steps outlined must be completed, including filing an itemized statement of medical services. *Id*. After the debtor filed for bankruptcy, the creditors attempted to correct the deficiencies by filing properly documented postpetition "amended" lien statements. The creditors argued that such postpetition filings were authorized under §§ 362(b)(3) and 546(b), as they related back to the original filings.[12] The court held:

> *Balfour* stands for the proposition that a physician may refile his or her lien, but it also stands for the proposition that it is the second lien, and not the first lien, which is enforced. The filing of the second lien does not relate back to the first lien in any way, shape or form.

Id.

Applying the above principles, ORC was entitled to file additional lien statements up to treatment's end, as long as it filed prior to payment of settlement proceeds to the Debtor.[13] The last valid lien statement is the one that is enforced. Because the untimely second lien statement does not relate back to the first, ORC is limited to the amount

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[12] These sections create an exception to the general rule that a party may not take any action to perfect a security interest after the filing of a bankruptcy petition where a party takes steps to maintain or continue perfection of an interest in property.

[13] Review of ORC's itemized statement indicates that medical treatment ceased in October 1996, almost eight months before the Debtor received the settlement proceeds from Farmers.

filed in its first lien statement.

Finally, we reject the Creditors' argument that the phrase "and up to final balance" is sufficient to provide notice that the lien will be for a greater amount than filed and covers future services. Section 46 clearly states that the lien claimant must set forth an *itemized* statement of the amount claimed, and we decline to expand this to include unitemized future services.

V. Conclusion.

For the reasons set forth above, the decision of the trial court avoiding the liens of TDS and RAI in their entirety, and partially avoiding the lien of ORC, is affirmed.